

STATE OF MICHIGAN
IN THE SUPREME COURT

GRASS LAKE IMPROVEMENT BOARD,	Supreme Court No. 154364
Petitioner–Appellant,	Court of Appeals No. 326571
v	Ingham Circuit Court
	No. 2014-1064-AA
MICHIGAN DEPARTMENT OF ENVIRONMENTAL QUALITY,	MAHS Case No. 09-63-0026-P
Respondent–Appellee.	

**SUPPLEMENTAL BRIEF ON APPEAL OF APPELLEE
MICHIGAN DEPARTMENT OF ENVIRONMENTAL QUALITY**

ORAL ARGUMENT REQUESTED

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INTRODUCTION

The question presented in this attorney-fees case is narrow: was it legally frivolous for the Michigan Department of Environmental Quality (DEQ) to follow the guidance of decades of case law and to apply the plain language of a statute until it could change an administrative rule that conflicted with that statute? The answer to that question is not jurisprudentially significant and will have little effect beyond the attorney fees themselves. The rule that DEQ formerly interpreted in a way that conflicted with a statute has been revised, 2015 Michigan Register 5 (April 1, 2015), p 75; the rule now properly follows the statute, so the conflict has been eliminated. Further, the Lake Board has been able to obtain what it wanted—permission to pursue its project.

Michigan law is already clear that, when a statute and a rule conflict, the statute controls, which is why the Court of Appeals correctly held that DEQ's position that it had to follow the statute was not frivolous. This Court should deny leave or affirm the decision of the Court of Appeals.

Upon discovering this conflict, the DEQ sought advice from the Attorney General's office, which informed the DEQ that it agreed that a conflict existed and the DEQ needed to change its rule, but that it should apply the statute until the rule could be changed because statutes prevail over rules when the two conflict.

The DEQ commenced efforts to change its rule, but the unfortunate reality is that the process of amending rules is complex and often takes a long time. This particular rule change was further complicated because of a multi-year audit of the

DEQ's water programs by the United States Environmental Protection Agency (which delegates significant regulatory authority to the DEQ and oversees many of its programs, including Part 301). In the interim, while it worked to change the rule, the DEQ issued a publicly available guidance document to inform the DEQ staff and the public that this conflict existed, and that it would apply the statute in situations where this conflict occurred.

The DEQ has since successfully changed the conflicting rule to harmonize it with the statute. Unfortunately, this lone dispute arose before the DEQ could change the rule. The question now before this Court is not whether the DEQ was correct that there was a conflict between the statute and the rule and that it should have applied the statute rather than the rule in this situation, but whether it was even *arguable* that the conflict existed and that the DEQ should have applied the statute in derogation of the rule instead of the other way around.

As set forth more fully below, the existence of a conflict is not only arguable, it is clear. In considering the facts of this dispute, two administrative law judges (ALJs), the former DEQ Director, and the Court of Appeals all acknowledged that there was at least significant tension, if not outright conflict, where applying the statute and the rule to this case necessitated opposite results. Only the Ingham Circuit Court disagreed, in an opinion and order premised entirely on errors of fact and law, which the Court of Appeals properly reversed.

It was not legally frivolous for the DEQ to apply the statute rather than the rule in this situation. It is black letter law in Michigan that statutes control when they conflict with rules. The Lake Board's arguments to the contrary are premised on a misstatement of one sentence of dicta from a Court of Appeals opinion which provides that agencies must change their rules when they conflict with statutes rather than simply ignore them. *Micu v City of Warren*, 147 Mich App 573, 584 (1986).

The Lake Board argues that, in *Micu*, the Court of Appeals meant that agencies must continue to apply their rules *in violation of statutes* until the rules can be changed. This is not what *Micu* says. *Micu* simply says, in dicta, that an agency must change its offending rule, which the DEQ did here. *Id.* But *Micu* does not provide guidance concerning what agencies should do in the interim when a rule cannot be changed instantaneously (as is usually the case). When weighing this one sentence of dicta against the decades of case law that clearly provides that statutes trump rules, it was not legally frivolous for the DEQ to argue that it should apply the statute rather than its rule while it worked to correct the rule.

Additionally, the Lake Board argues that the law that statutes prevail over rules applies only in courts, and not in administrative agencies. It is the Lake Board's position that, if an agency promulgates a rule that conflicts with a statute, it must knowingly ignore the statute in order to apply the rule. Simply put, this is the opposite of what the law says. When interpreting and applying laws, administrative agencies are bound by the same canons of statutory construction as

courts. And an agency's rulemaking authority is delegated to it by the Legislature, so it cannot exceed the boundaries set by the Legislature in the controlling statutes.

For this Court to hold that it was legally frivolous for the DEQ to abide by the limitations on its authority set forth in Part 301, rather than ignore those limitations in order to apply its own administrative rule, would be to allow agencies to effectively overrule the Legislature in conflict situations while the process of changing a rule plays out. Even worse, it would be to hold that it was not even *arguably* legally proper for the agency to attempt to comply with the statutory limitations on its authority.

For these reasons, the DEQ respectfully requests that this Court deny the Lake Board's application for leave to appeal or, in the alternative, affirm the opinion of the Court of Appeals on the grounds that it was not frivolous for the DEQ to argue that it should comply with a controlling statute in lieu of a conflicting administrative rule.

COUNTER-STATEMENT OF FACTS AND PROCEEDINGS

The DEQ's counter-statement of facts and proceedings is set forth in the DEQ's September 29, 2016 brief in opposition to the Grass Lake Improvement Board's application for leave to appeal. (DEQ's 9/29/16 Brief in Opposition, pp 6–18.)

STANDARD OF REVIEW

The standard of review is set forth in the DEQ's September 29, 2016 brief in opposition to the Grass Lake Improvement Board's application for leave to appeal. (DEQ's 9/29/16 Brief in Opposition, pp 19–20.)

ARGUMENT

- I. **The DEQ's position, that it should apply the relevant statute until such time as it could change the conflicting administrative rule, was not frivolous. In fact, it was in accordance with the overwhelming weight of binding case law.**
 - A. **Applying the relevant administrative rule in this matter would have required the DEQ to ignore and violate the relevant statute.**

Throughout this litigation, the Lake Board has argued that there is no conflict between the statute and the administrative rule at issue, and that the administrative rule is simply a narrow reading of the statute. (Lake Board's 10/20/16 Reply, pp 2–4.) But the fact is that there is a conflict: the rule defined “enlarge” to include only dredging the bottomlands of an inland lake or stream to increase its footprint, Mich Admin Code, R 281.811(1)(e) (pre-2015 version), while the statute did not include this limitation and instead covered any type of enlargement, MCL 324.30102(1)(d), such as adding water. Because of this conflict, an ALJ and the DEQ Director acknowledged that the statute and the administrative rule, when applied to the facts of this case, demand opposite results; a second ALJ has acknowledged the complexity of the conflict of laws at issue, and the Court of Appeals acknowledged clear tension between the statute and the rule.

(Admin Rec Vol 2, pp 572–574; Admin Rec Vol 2, p 435; Admin Rec Vol 1, pp 10–11; DEQ’s 9/29/16 Brief in Opposition, Ex A, p 6.) As noted in the DEQ’s brief in opposition to the Lake Board’s application for leave to appeal, this is the very definition of a conflict. (DEQ’s 9/29/16 Brief in Opposition, p 22.)

Part 301 provides that no person may enlarge an inland lake without a permit. MCL 324.30102(1)(d). The DEQ is charged with administering Part 301. MCL 324.30102(1); MCL 324.30101(d). If the DEQ had declined to perform its statutory obligation because of a conflicting administrative rule, that would be a violation of the statute.

In its reply to the DEQ’s brief in opposition to its application for leave to appeal, the Lake Board argues that there was no conflict between the statute and the rule here because the statute does not define the term “enlarge.” (Lake Board’s 10/20/16 Reply, pp 2–3.) But Michigan law is clear that, when a statute does not define a term, that term is afforded its ordinary meaning, and it is appropriate to use a dictionary definition. *Majurin v Dep’t of Social Servs*, 164 Mich App 701, 705–706 (1988), citing *In re Condemnation of Lands*, 113 Mich App 207, 211 (1984), lv den 421 Mich 856 (1985).

As the first ALJ to consider this dispute found, the term “enlarge” means “to make larger” or “to increase.” (Admin Rec Vol 2, p 573, citing *Black’s Law Dictionary*, 2d ed.) Under the commonly understood dictionary definition, adding water to a lake to raise the lake level—as the Lake Board’s project does—“enlarges” the lake. (*Id.*) Any fourth grader would agree, for example, that pouring water into

a mud puddle would “enlarge” the mud puddle. Thus, a permit is required under MCL 324.30102(1)(d), but was not under the more restrictive definition in Mich Admin Code, R 281.811(1)(e). Contrary to the Lake Board’s argument, this is not merely a narrow definition that is still harmonious with the statute. (Lake Board’s 10/20/16 Reply, pp 2–3.) The law is clear that an agency cannot define a term so narrowly that it changes the meaning of the statute. *Ludington Serv Corp v Acting Comm’r of Ins*, 444 Mich 481, 505 (1994); *Fellows v Michigan Comm for the Blind*, 305 Mich App 289, 299–300 (2014); *Herrick Dist Library v Library of Michigan*, 293 Mich App 571, 580–584 (2011). This is undeniably a conflict.

As a result of this inadvertent conflict between the statute and the rule, the DEQ found itself faced with the question of what to do: apply the plain language of the statute (in accordance with decades of well-established case law that says statutes take precedence over rules when the two conflict) while working to get the rule changed, or continue to apply the rule (in violation of the statute and the relevant case law) until the rule was changed. At a minimum, the DEQ’s choice to apply the statute instead of the rule had arguable legal merit.

B. *Micu v City of Warren* does not require a state agency to ignore a statute until it can change a conflicting administrative rule.

The primary case relied upon by the Lake Board is *Micu v City of Warren*, in which the Court of Appeals held that an applicable statute (the Elliot-Larsen Civil Rights Act) trumped a City of Warren administrative rule that required city

firefighters to be at least five feet eight inches tall. *Micu*, 147 Mich App at 584. The Court of Appeals then stated in dicta:

We do point out that, once promulgated, the rules made by an agency to govern its activity cannot be violated or waived by the agency that issued the rules. The civil service commission could not have waived the 5 feet 8 inch minimum requirement to allow the plaintiff to complete the application process. The rule would have had to have been changed. [*Micu v City of Warren*, 147 Mich App at 584.]

The DEQ has never disputed the fact that, once it identified the conflict between the statute and the rule here, it had to change the rule. On the contrary, the administrative record clearly establishes that the DEQ began the process of changing the rule before this litigation arose. (Admin Rec Vol 2, pp 640–642 [transcript, pp 129:23–131:24].) But an administrative agency cannot change an administrative rule overnight. The process of amending rules is often slow, and it is not uncommon for amendments to administrative rules to take years. (*Id.*; DEQ’s 9/29/16 Brief in Opposition, pp 25–26.)

Here, the record clearly establishes that the DEQ faced obstacles in the form of a multi-year audit by the United States Environmental Protection Agency (which delegates significant regulatory authority to the DEQ and oversees many of its programs), as well as disagreement among relevant stakeholders as to how the rule should be amended. (Admin Rec Vol 2, pp 640–642 [transcript, pp 129:23–131:24].) This is in addition to the extensive amendment procedures set forth in the Administrative Procedures Act. MCL 24.239-247; (Admin Rec Vol 2, pp 640–642 [transcript, pp 129:23–131:24]; DEQ’s 9/29/16 Brief in Opposition, pp 25–26.)

While *Micu* is clear that an agency must amend its rule to cure conflicts with a statute, *Micu* does not provide guidance as to what the agency should do during the course of the amendment process. Therefore, from the moment the DEQ became aware of this conflict to the moment the rule was successfully changed, the DEQ faced the question of whether to apply the statute or the rule.

Faced with this question, the DEQ consulted with the Attorney General's office for advice, and was directed to the overwhelming case law that says that an administrative rule may not violate a statute, and statutes take precedence over rules when the two conflict. See, e.g., *Michigan Sportservice, Inc v Nims Turfservice, Inc*, 319 Mich 561, 566 (1948) ("The provisions of the rule must, of course, be construed in connection with the statute itself. In case of conflict, the latter governs. It is not within the power of the department of revenue to extend the scope of the act."); *Guss v Ford Motor Co*, 275 Mich 30, 34 (1936) ("The board may make rules consistent with the statute. Such rules, when made, bind the board."); see also Michigan Pleading and Practice § 60:26. Based on this clear legal authority, the DEQ applied the statute rather than the rule until the rule could be changed. The Lake Board's contention that this position did not even have *arguable* legal merit is simply erroneous.

C. When interpreting and applying laws, administrative agencies rely on the judicial canons of construction, just like courts.

In its reply to the DEQ's brief in opposition to its application for leave to appeal, the Lake Board argued that courts apply statutes rather than rules, but

that this is a “judicial standard,” and that *Micu* stands for the proposition that agencies must continue to apply their rules even if it means violating a statute. (Lake Board’s 10/20/16 Reply, pp 3–4.) This argument fails for two reasons.

First, as noted above, *Micu* does not stand for the proposition that an agency must ignore or violate a statute if the statute conflicts with an administrative rule. That is simply an inaccurate representation of the dicta in *Micu*. Rather, *Micu* stands for the proposition that a statute takes precedence over a conflicting rule, and an agency must change its rule when it discovers a conflict. *Micu*, 147 Mich App at 584. As noted earlier, *Micu* does not provide any guidance concerning what the agency must do until the rule is successfully changed.

Second, administrative agencies are required to interpret and apply laws all the time. In addition to determining how to apply statutes and administrative rules to the facts of specific cases, agencies perform quasi-judicial functions by holding contested case hearings and issuing declaratory rulings under the Administrative Procedures Act. MCL 24.271–287; MCL 24.263. When applying and interpreting statutes, administrative agencies are bound by the same canons of construction that are applied by courts. *In re Complaint of Rovas*, 482 Mich 90, 98–99, 103, and 108–109 (2008); *City of Detroit v Charter Twp of Plymouth*, unpublished opinion per curiam of the Court of Appeals, issued January 12, 2016 (Docket No. 327843), p 8, lv den (copy of *City of Detroit* attached as Exhibit A).

The Lake Board's position is that the DEQ should have knowingly ignored the requirements of a statute because following the statute would have meant violating an administrative rule. This is the opposite of how the law works. The DEQ, like every other administrative agency, receives its rulemaking power from the Legislature, and it is not free to pass rules that conflict with statutes.

Ludington Serv Corp v Acting Comm'r of Ins, 444 Mich at 505 (an “agency’s interpretation . . . cannot be use to overcome the statute’s plain meaning”) (emphasis and second ellipsis in original); *Fellows v Michigan Comm for the Blind*, 305 Mich App at 299–300; *Herrick Dist Library v Library of Michigan*, 293 Mich App at 580–584. If it inadvertently does so, as it did here, the law is clear that the statute controls over the rule, not the other way around. See, e.g., *Michigan Sportservice, Inc*, 319 Mich 561; *Guss*, 275 Mich 30; Michigan Pleading and Practice § 60:26.

The Lake Board even acknowledges that courts apply statutes over conflicting rules, but argues that the DEQ should have done the opposite, because its status as an administrative agency somehow requires it to. (Lake Board’s 10/20/16 Reply, pp 3–4.) In making this argument, the Lake Board argues that it would confuse the public if an agency were allowed to simply ignore its rules. Specifically, the Lake Board argues that, “It cannot be the law that the public is made to guess whether an agency will or will not apply its rule to any particular manner (sic).” (*Id.*) In addition to being legally erroneous, this argument is factually off point. The DEQ did not simply make the Lake Board guess whether it

would apply the statute or the rule here. Rather, after it became aware of the legal conflict, and while it was working to amend the rule so it would comply with the statute, the DEQ issued a publicly available guidance document to inform the public, and the DEQ's staff, that this conflict existed and that the DEQ's position was that it was required to apply the statute until the rule could be changed.

(Admin Rec Vol 1, pp 11–12.) The DEQ did not leave the public to guess what it might do—rather, it took steps to keep the public fully informed and to ensure that its staff took a uniform approach while it worked to fix the conflict between the statute and the rule.

In short, the Lake Board has argued throughout this litigation that, by applying the statute while working to change its rule, the DEQ has overreached, exceeded its authority, and left the public uninformed about what it would do. This is inaccurate. Rather, the DEQ recognized the conflict between the statute and the rule, worked to change the rule to comply with the statute, and made sure that the public was informed every step of the way.

II. The Lake Board's assertion that the Court of Appeals decision in this matter will allow the DEQ to "ignore its duly promulgated rules" is meritless.

As noted in the DEQ's brief in opposition to the Lake Board's application for leave to appeal, the rule at issue—Rule 281.811(1)(e) of the Michigan Administrative Code—has been successfully changed. 2015 Michigan Register 5 (April 1, 2015), p 75. This means that the conflict between the statute and the rule has been resolved, and will not recur. Despite this, the Lake Board insists that this

matter will arise again because the DEQ will be free to disregard other unspecified administrative rules whenever it wants. (Lake Board's 10/20/16 Reply, p 5.)

The Lake Board's argument on this issue is entirely hypothetical. It points to no other instance of actual or potential conflict between statutes and rules administered by the DEQ, let alone any other situation in which the DEQ has actually declined to apply a rule because of such conflict.

Instead, the Lake Board simply cites a pair of prior cases in which the Court of Appeals stated that agencies are bound by their administrative rules. *Micu*, 147 Mich App at 573; *De Beaussaert v Shelby Twp*, 122 Mich App 128, 129 (1982).

De Beaussaert, like *Micu*, involved an administrative rule that required certain physical qualifications for fire fighters (in this case, at least 20/40 vision). *Id.* Here, as in *Micu*, the Court of Appeals stated that an agency is not free to waive or ignore its own administrative rules, but did not hold that that an agency is required to violate a statute in order to comply with a conflicting rule. *Id.* These cases do not provide any support for the claim that the issue presented in this appeal is likely to arise again.

Moreover, the Lake Board misstates the issue presented in this appeal. The question presented here is not whether the DEQ was right or wrong to apply the relevant statute until it could fix its conflicting rule. Rather, this appeal concerns whether it was even *legally arguable* for the DEQ to take the position that it did.

- A. **The question before the Court is not whether the DEQ is free to ignore its own duly promulgated rules, but rather whether it was frivolous for the DEQ to argue that it should apply a statute rather than a conflicting rule while it worked to change the rule.**

This appeal does not concern whether the DEQ should have applied the statute or its conflicting rule. Indeed, the Court does not need to resolve the actual merits of that question, because the only issue before the Court in this appeal is whether it was even legally *arguable* for the DEQ to apply the statute. And that means any comments by this Court about the merits will likely be dicta. *Wold Architects & Engineers v Strat*, 474 Mich 223, 233 n 3 (2006) (defining “dicta” as “[s]tatements and comments in an opinion concerning some rule of law or legal proposition not necessarily involved nor essential to determination of the case” (some quotation marks omitted)).

The issue of which course of action the DEQ should take was decided by the former DEQ Director in his May 1, 2013 final order on the motion for reconsideration, in which he held that the DEQ was bound to apply its administrative rule even if it conflicted with the plain language of the governing statute.¹ (Admin Rec Vol 2, pp 432–437.) This issue was decided in the Lake

¹ While the DEQ staff and its counsel were, and remain, concerned with an agency final decision and order that holds that the agency is free to, and, in fact, *required* to violate a statute until such time as its conflicting rule is amended, that was the decision that was reached in the underlying contested case hearing. (Admin Rec Vol 2, pp 432–437.) Michigan’s Administrative Procedures Act does not allow an agency to appeal its own Director’s Final Decision and Order, and thus the DEQ had no further legal recourse, and is now left with this decision from its former Director. MCL 24.301.

Board's favor, and the Lake Board was able to proceed with its project. But his order will not have ongoing effect in future cases, because the administrative rule that order addressed has since been changed and so now is consistent with the statute.

This appeal therefore is not about agency conduct going forward or even whether the Lake Board was able to implement its project; rather, it merely arises from the subsequent proceeding in which the Lake Board sought attorney fees. The issue is whether the DEQ staff's position in the underlying contested case that it should apply the statute in lieu of the conflicting rule was devoid of arguable legal merit. The Court of Appeals decision in this matter did not, by any stretch, authorize the DEQ to ignore its administrative rules whenever it sees fit. Rather, the Court of Appeals decision held that the DEQ's position in the underlying contested case hearing was at least arguably meritorious, and therefore the DEQ was not required to pay the Lake Board's attorney fees. (Ex A to DEQ's 9/29/16 Brief in Opposition.)

The irony of the Lake Board's position should not be lost here. Throughout this matter, the Lake Board has accused the DEQ of overreaching its authority because the DEQ did not believe that it could overrule the Legislature and ignore the requirements of a statute simply by implementing an administrative rule that allowed it to. The DEQ has done everything it can to stay within the boundaries of its authority—it recognized the conflict between its rule and the statute, sought the advice of its attorneys, worked to change the offending rule based on that advice,

and even issued a public guidance document to inform its staff and the public that, until it could change the rule, it would apply the statute because it believed that was what the law required.

The Lake Board's position, on the other hand, is that the DEQ should have ignored the requirements of the statute in order to apply its own rule until the rule was amended. Had the DEQ done so, then it truly would have overstepped its authority by disregarding the limitations placed on it by the Legislature so that it could apply its own rule instead.

B. The Lake Board's argument on this point is entirely hypothetical, with no basis to support its unilateral assertion that this situation will occur again.

The Lake Board offers no evidence, nor any authority of any kind, to support its unilateral assertion that, unless the DEQ is forced to pay the Lake Board's attorney fees, the DEQ will simply ignore its administrative rules any time it wants to. This is because no such evidence or authority exists. As noted above, the Lake Board has not identified any other actual or even potential conflict between statutes and rules administered by the DEQ that even *might* give rise to a similar situation in the future. Nor can the Lake Board point to any other instance in which the DEQ has not followed an administrative rule because of conflict with the applicable statute. Rather, the Lake Board has simply made the unsupported assertion the issue is likely to recur in an attempt to paint the DEQ as a lawless agency run amok, when the DEQ's only "offense" in this matter was to attempt to comply with a governing statute.

The truth is that this was one lawsuit based on a conflict of laws that no longer exists. This dispute cannot occur again because the administrative rule has been amended to comply with the statute. The Lake Board's concern—that someday another rule might conflict with another statute and problems might arise unless the DEQ is forced to pay the Lake Board's attorney fees—can be addressed in a future case if that hypothetical circumstance arises.

III. The Court of Appeals properly reversed the opinion and order of the Ingham Circuit Court, which was premised on legal and factual errors.

The Court of Appeals correctly reversed the opinion and order of the Ingham Circuit Court and reinstated the ALJ's order. The ALJ correctly noted that the legal issue in the underlying contested case hearing—whether to apply a governing statute or a conflicting administrative rule until the rule could be changed—was complex, and thus it was not frivolous for the DEQ to apply the statute. (Ex A to DEQ's 9/29/16 Brief in Opposition.)

In contrast, the opinion and order of the Ingham Circuit Court, which reversed the ALJ's order, was premised on errors of law and facts that were not in the record—and, in fact, were directly contradicted by the record.

In its opinion and order, the Ingham Circuit Court applied the incorrect statute and reversed the ALJ for not including findings of fact and conclusions of law in his order, even though the applicable statute does not require findings of fact and conclusions of law. (Ex B to DEQ's 9/29/16 Brief in Opposition, p 3.). In so holding, the circuit court mistakenly applied the requirements of MCL 24.285(4),

which governs a completely different type of administrative decision. The applicable statute, MCL 24.323(4), contains no such requirement.

Additionally, the circuit court found, as a matter of fact, that the DEQ never attempted to change its administrative rule. (Ex B to DEQ's 9/29/16 Brief in Opposition, p 4.) Not only was this inaccurate, there was *no evidence in the record whatsoever* to support this factual finding, and there was uncontroverted evidence that specifically showed that the DEQ had worked for *years* to amend the rule. (Admin Rec Vol 2, pp 640–642 [transcript pp 129:23–131:24].)

Further, the circuit court applied an incorrect legal standard in holding that the DEQ's legal position in the underlying contested case was "devoid of legal merit," which the Court of Appeals properly reversed because the correct standard is whether the DEQ's position was devoid of *arguable* legal merit. (Ex B to DEQ's 9/29/16 Brief in Opposition, p 3; Ex A to DEQ's 9/29/16 Brief in Opposition, pp 5–6.)

Finally, the circuit court held, as a matter of fact, that special circumstances existed that warranted an award of attorney fees roughly five times what is provided by the Administrative Procedures Act. (Ex B to DEQ's 9/29/16 Brief in Opposition, pp 4–5.) This holding was legally baseless for two reasons.

First, whether "special circumstances" existed is a question of fact that can be determined only after an evidentiary hearing by the "presiding officer" (the ALJ). MCL 24.323(5)(b). There was no factual hearing in this matter. Rather, the ALJ determined as a matter of law that the DEQ's position in the underlying contested case hearing was not frivolous, and dismissed the Lake Board's case. (Admin Rec

Vol 1, pp 8–13.) The Lake Board then appealed to the Ingham Circuit Court, which held oral arguments on appeal, but did not conduct an evidentiary hearing. The circuit court even stated on the bench that it lacked the authority to determine this issue, and specifically forbade counsel for the DEQ from arguing it. (2/4/15 Hr’g Tr, p 18:2–18.) The circuit court then ruled against the DEQ on this very issue. (Ex B to DEQ’s 9/29/16 Brief in Opposition, pp 4–5.)

Second, the circuit court held that these “special circumstances” existed because this case was one of a very complex scientific and technical nature, which required “highly technical understandings of the natural sciences, engineering, and state and federal environmental law.” (Ex B to DEQ’s 9/29/16 Brief in Opposition, p 4.) This was an administrative hearing decided on a purely legal issue: whether the DEQ should apply the statute or the rule. (Admin Rec Vol 1, pp 8–13.) There was no evidentiary hearing, no scientific or technical analysis, no engineering involved whatsoever, and certainly no discussion of *federal* environmental law. (*Id.*) Confronted with the fundamentally flawed opinion and order issued by the circuit court in this matter, the Court of Appeals correctly reversed, and reinstated the well-reasoned order of the ALJ.

CONCLUSION AND RELIEF REQUESTED

This matter presented a difficult legal question for the DEQ: confronted with a conflict between the controlling statute and an administrative rule, and unable to change the rule for some time, which should it apply? In addressing this situation, the DEQ did everything in its power to act appropriately: it consulted with its

attorneys and, based on their advice, chose to apply the statute in lieu of the rule rather than the other way around. Additionally, it issued a guidance document so that its staff and the general public would be aware of the situation and would understand why the DEQ chose that approach to addressing the conflict.

Contrary to the Lake Board's assertions, this course of action was not devoid of arguable legal merit. The Court of Appeals correctly held that, given the undeniable tension between the statute and the rule, the DEQ's position was arguably meritorious. For all of the reasons set forth above, the DEQ respectfully requests that this Court deny the Lake Board's application for leave to appeal or, alternatively, affirm the opinion of the Court of Appeals.

Respectfully submitted,

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Dated: August 2, 2017

LF: Grass Lake Improvement Board MiSC/AG#2009-0033498-G/Supplemental Brief on Appeal 2017-08-02

EXHIBIT A

STATE OF MICHIGAN
COURT OF APPEALS

CITY OF DETROIT,

Plaintiff-Appellee,

v

CHARTER TOWNSHIP OF PLYMOUTH,

Defendant-Appellant,

and

COUNTY OF WAYNE and WAYNE COUNTY
TREASURER,

Defendants.

UNPUBLISHED

January 12, 2016

No. 327843

Wayne Circuit Court

LC No. 13-004635-CH

Before: TALBOT, C.J., and CAVANAGH and K. F. KELLY, JJ.

PER CURIAM.

Defendant, Charter Township of Plymouth (Plymouth), appeals as of right the trial court's final judgment, which partially vacated a judgment of foreclosure and quieted title to the subject property of the foreclosure at issue in this matter in its prior owner, plaintiff, City of Detroit (Detroit). We affirm.

I. FACTUAL BACKGROUND

This case arises out of Detroit's action to quiet title to a 190-acre parcel of vacant real property (the subject property) located in Plymouth, which was formerly part of a 323-acre parcel (the parent parcel) that once housed the Detroit House of Corrections. Detroit duly paid the property taxes for the parent parcel from 1994 through 2006. In June 2006, it sold a 133-acre parcel (the Demco parcel) to Demco 54, LLC (Demco) for \$3,089,350, thereby effectively dividing the parent parcel into two parcels. After the sale, in 2007 and 2008, neither Detroit nor Demco paid the property taxes for any portion of the parent parcel. Thus, on April 23, 2010, the Wayne County Treasurer (the Treasurer) recorded a Certificate of Forfeiture for the parent parcel, and shortly thereafter it filed a petition seeking judicial foreclosure. Despite the Treasurer's attempts to notify it, Detroit never received notice of the foreclosure proceedings. Eventually, the Treasurer was granted a judgment of foreclosure, a notice of which was recorded.

Plymouth later purchased the entire parent parcel from the Treasurer for roughly the same amount as Detroit's unpaid taxes, which was only a fraction of the property's actual value.

After learning of the foreclosure, Detroit instituted the instant action to quiet title to the subject property. The parties filed cross-motions for summary disposition. After considering the matter, the trial court decided that the Treasurer's attempts to notify Detroit of the foreclosure proceedings were insufficient to comport with the requirements of due process. The trial court further held that, as property owned by a municipality, the subject property was exempt from forfeiture under the General Property Tax Act (GPTA), MCL 211.1, *et seq.* Therefore, the trial court granted Detroit summary disposition pursuant to MCR 2.116(C)(10), subsequently entering its final judgment that partially vacated the judgment of foreclosure, as to the subject property only, and quieted title to the subject property in Detroit.

Plymouth raises several claims of error on appeal. First, it argues that the trial court lacked subject-matter jurisdiction over this matter because Detroit failed to timely appeal from the foreclosure judgment, redeem the property, or seek cancellation of the foreclosure pursuant to MCL 211.78k(9). We disagree.

As a threshold matter, Plymouth's argument challenging the subject matter jurisdiction of the trial court is contained in its reply brief, not its principal appellate brief, which is improper under MCR 7.212(G) ("Reply briefs must be confined to rebuttal of the arguments in the appellee's or cross-appellee's brief"). Thus, ordinarily we would refuse to consider this improperly raised issue. See, e.g., *Kinder Morgan Mich, LLC v City of Jackson*, 277 Mich App 159, 174; 744 NW2d 184 (2007). However, since "[s]ubject-matter jurisdiction cannot be waived and can be raised at any time by any party or the court," *In re Contempt of Dorsey*, 306 Mich App 571, 581; 858 NW2d 84 (2014), we nevertheless reach the substantive merits of Plymouth's jurisdictional challenge. See also *Bezeau v Palace Sports & Entertainment, Inc*, 487 Mich 455, 479 n 2; 795 NW2d 797 (2010) (YOUNG J., dissenting) ("[S]ubject matter jurisdiction may be challenged at any time, even if raised for the first time on appeal.").

"Questions surrounding subject-matter jurisdiction present questions of law and are reviewed de novo." *Dorsey*, 306 Mich App at 581. Likewise, "issues of constitutional and statutory construction" are legal questions reviewed de novo. *In re Petition by Wayne Co Treasurer for Foreclosure*, 478 Mich 1, 6; 732 NW2d 458 (2007) (*Perfecting Church*).

In support of its argument, Plymouth cites *Perfecting Church*, which construed a former version of the pertinent statutory provision, MCL 211.78k(6), and also evaluated the constitutionality of that provision. *Id.* at 6-11. In pertinent part, MCL 211.78k(6) provides:

[F]ee simple title to property set forth in a petition for foreclosure filed under section 78h [MCL 211.78h] on which forfeited delinquent taxes, interest, penalties, and fees are not paid on or before the March 31 immediately succeeding the entry of a judgment foreclosing the property under this section, or in a contested case within 21 days of the entry of a judgment foreclosing the property under this section, *shall vest absolutely in the foreclosing governmental unit, and the foreclosing governmental unit shall have absolute title to the property. . . .* The foreclosing governmental unit's title is not subject to any recorded or

unrecorded lien *and shall not be stayed or held invalid* except as provided in subsection (7) [governing appeals from such foreclosure judgments] or (9) [providing a procedure by which the “foreclosing governmental unit may cancel the foreclosure”]. [MCL 211.78k(6), (7), and (9); emphasis added.]

The former version of MCL 211.78k(6) construed in *Perfecting Church* did not contain the “on or before the March 31 immediately succeeding the entry of a judgment foreclosing the property under this section” language. 2006 PA 611; *Perfecting Church*, 478 Mich at 7. Thus, under that former version, the property owner had 21 days to either “redeem the property or appeal the judgment of foreclosure[.]” *Id.* at 8. The *Perfecting Church* Court ultimately construed MCL 211.78k(6) to mean that, “[i]f a property owner does not redeem the property or appeal the judgment of foreclosure within 21 days, then MCL 211.78k(6) *deprives the circuit court of jurisdiction to alter the judgment of foreclosure*,” thereby permitting “a foreclosing governmental unit to ignore completely the mandatory notice provisions of the GPTA, seize absolute title to a taxpayer’s property, and sell the property, leaving the circuit court impotent to provide a remedy for the blatant deprivation of due process.” *Id.* at 8, 10 (emphasis added). Hence, the plain language of the provision is “patently unconstitutional” as applied “in cases where the foreclosing entity fails to provide constitutionally adequate notice[.]” *Id.* Since “the Legislature cannot create a statutory regime that allows for constitutional violations with no recourse,” the *Perfecting Church* Court held “that portion of the statute purporting to limit the circuit court’s jurisdiction to modify judgments of foreclosure is unconstitutional and unenforceable as applied to property owners who are denied due process.” *Id.* at 10-11.

Plymouth argues that, under the *Perfecting Church* construction of MCL 211.78k(6), the trial court lacked subject-matter jurisdiction to decide this matter. Plymouth fails to recognize that there is a fundamental difference between, on the one hand, whether the trial court had subject-matter jurisdiction to modify the foreclosure judgment under MCL 211.78k(6), and, on the other hand, whether the circuit had subject-matter jurisdiction to hear and decide this matter at all. “Generally, subject-matter jurisdiction is defined as a court’s power to hear and determine a cause or matter.” *Dorsey*, 306 Mich App at 581. “More specifically, subject-matter jurisdiction is the deciding body’s authority to try a case of the kind or character pending before it, *regardless of the particular facts of the case*.” *Id.* (emphasis added). The circuit court is “a court of general equity jurisdiction,” with the power to issue declaratory rulings, including declaratory rulings regarding the constitutionality of laws. *Universal Am-Can Ltd v Attorney General*, 197 Mich App 34, 37; 494 NW2d 787 (1992). Hence, even if Plymouth is correct that it complied with all of the GPTA’s statutory notice provisions, and that it also provided constitutionally adequate notice of the foreclosure to Detroit, the trial court nevertheless had subject-matter jurisdiction to hear and decide this matter. Whether its decision was erroneous, i.e., whether the trial court incorrectly determined that Plymouth gave insufficient notice to comport with due process, does not impact the court’s original subject-matter jurisdiction over this action. See *Clohset v No Name Corp (On Remand)*, 302 Mich App 550, 562; 840 NW2d 375 (2013) (“[O]nce a court acquires jurisdiction, unless the matter is properly removed or dismissed, that court is charged with the duty to render a final decision on the merits of the case, resolving the dispute, with the entry of an enforceable judgment.”).

Plymouth next argues that the trial court erred by concluding that the Treasurer's attempts to notify Detroit of the foreclosure proceedings were insufficient to comport with the constitutional demands of procedural due process. We disagree.

This Court reviews de novo both a trial court's decision on a motion for summary disposition and its constitutional determination of whether due process was afforded to a party. *Elba Twp v Gratiot Co Drain Comm'r*, 493 Mich 265, 277; 831 NW2d 204 (2013). "Questions of statutory interpretation are also reviewed de novo." *Id.* at 278.

"[A] party's knowledge of a tax delinquency does not equate to notice of a foreclosure proceeding." *Ligon v City of Detroit*, 276 Mich App 120, 126; 739 NW2d 900 (2007). Pursuant to the Due Process Clauses of the Michigan and United States Constitutions, "[p]roceedings that seek to take property from its owner must comport with due process." *Sidun v Wayne Co Treasurer*, 481 Mich 503, 509; 751 NW2d 453 (2008). "The notice provisions of the GPTA seek to fulfill [the] obligation" of affording due process to property owners before depriving them of their property. *Id.* at 512. "When there are multiple owners of a piece of property, due process entitles each owner to notice of foreclosure proceedings." *Id.*

In pertinent part, MCL 211.78i(1) provides:

Not later than May 1 immediately succeeding the forfeiture of property . . . the foreclosing governmental unit shall initiate a search of records identified in subsection (6) [tax records and land title records] to identify the owners of a property interest in the property who are entitled to notice under this section. . . .

After identifying such parties, the foreclosing governmental unit "must send notice by certified mail to those owners at 'the address reasonably calculated to apprise those owners' of the foreclosure proceedings. MCL 211.78i(2)." *Sidun*, 481 Mich at 512-513. If the foreclosing governmental unit "is unable to ascertain the address reasonably calculated to apprise the owners . . . entitled to notice under this section," notice by publication can be substituted, consisting of a notice "published for 3 successive weeks, once each week, in a newspaper published and circulated in the county in which the property is located, if there is one." MCL 211.78i(5).

Plymouth argues that the Treasurer complied with the provisions of MCL 211.78i by sending notice to Detroit, via certified mail, at an address reasonably calculated to apprise Detroit of the foreclosure proceedings, thereby satisfying MCL 211.78i(2). Plymouth's argument ignores the fact that Detroit is not an individual whose address might fluctuate. It is one of our nation's largest metropolitan cities, with readily discernible addresses for its various departments that are a matter of public record. Indeed, in announcing presumptively reasonable steps to ascertain a property owner's address, MCL 211.78i(2) contemplates this inherent difference between individuals and other entities, listing different "reasonable steps" based on the identity of the property owner:

(a) For an individual, a search of the records of the probate court for the county in which the property is located.

(b) For an individual, a search of the qualified voter file established under section 509o of the Michigan election law, 1954 PA 116, MCL 168.509o, which is authorized by this subdivision.

(c) For a partnership, a search of partnership records filed with the county clerk.

(d) For a business entity other than a partnership, a search of business entity records filed with the department of labor and economic growth. [MCL 211.78i(2).]

Although the above provision does not specify what steps should be taken to ascertain the address of a municipality entitled to notice, MCR 2.105(G)(2) provides that, in a civil matter, a city may be served by service “made on ‘the mayor, the city clerk, or the city attorney of a city.’” *McLean v Dearborn*, 302 Mich App 68, 78; 836 NW2d 916 (2013).

While MCR 2.105(G)(2) may not be controlling over the instant inquiry, it is certainly instructive about what reasonable steps the Treasurer might have taken to locate an address calculated to apprise Detroit of the foreclosure proceedings. The Treasurer is located within the same county as Detroit, which is that county’s largest city. With a modicum of effort—particularly in this digital era where information is so freely available—the Treasurer could have ascertained the address for Detroit’s mayor, its city clerk, its city council, its legal department, or its planning and development department. Indeed, the address of the attorney who drafted Detroit’s quit claim deed, by which it severed the Demco parcel from the parent parcel, was a matter of public record because, as is legally required for recordation of a deed, MCL 565.201a, the drafting attorney’s address appeared on the recorded quit claim deed. Nevertheless, the Treasurer either failed to discover the above addresses or failed to send notice of the foreclosure to those addresses. Instead, it sent the foreclosure notice to the city’s planning and development department at an address where that department was not located, further failing to specify a room or suite number for that department within the massive office building to which the Treasurer mistakenly sent the notice. Thus, the Treasurer failed to abide by the GPTA notice provisions in MCL 211.78i; it did not take steps to ascertain an address reasonably calculated to apprise Detroit of the pending foreclosure proceedings.

However, because the GPTA’s notice provisions generally “provide more notice than is required to satisfy due process,” strict compliance with those provisions is unnecessary to provide adequate notice to satisfy due process. *Perfecting Church*, 478 Mich at 10 n 19. Thus, the fact that the Treasurer failed to comply with the GPTA’s notice provisions is not necessarily fatal to Plymouth’s argument. If the Treasurer’s actions nevertheless provided Detroit with adequate notice to satisfy due process, technical violations of the GPTA’s notice provisions are immaterial. See *id.*

“[D]ue process is flexible and calls for such procedural protections as the particular situation demands.” *Morrissey v Brewer*, 408 US 471, 481; 92 S Ct 2593; 33 L Ed 2d 484 (1972).

A fundamental requirement of due process in such proceedings is “notice reasonably calculated, under all the circumstances, to apprise interested parties of the pendency of the action and afford them an opportunity to present their objections.” *Mullane v Central Hanover Bank & Trust Co*, 339 US 306, 314; 70 S Ct 652, 94 L Ed 865 (1950). Interested parties are “entitled to have the [government] employ such means ‘as one desirous of actually informing [them] might reasonably adopt’ to notify [them] of the pendency of the proceedings.” *Dow v Michigan*, 396 Mich 192; 240 NW2d 450 (1976), quoting *Mullane*, [339 US at 315]. That is, the means employed to notify interested parties must be more than a mere gesture; they must be means that one who actually desires to inform the interested parties might reasonably employ to accomplish actual notice. *Mullane*, [339 US at 315]. However, “[d]ue process does not require that a property owner receive actual notice before the government may take his property.” *Jones v Flowers*, 547 US 220, 226; 126 S Ct 1708; 164 L Ed 2d 415 (2006)]. [*Sidun*, 481 Mich at 509 (alterations to citations added, other alterations in original).]

Therefore, the reasonableness of the steps taken to notify a property owner of foreclosure varies “depending on what information the government had” at the time it sought to notify the property owner. *Sidun*, 481 Mich at 510 (discussing *Mullane*, 339 US at 309-310). When providing notice by mail, “[t]he government must consider unique information about an intended recipient regardless of whether a statutory scheme is reasonably calculated to provide notice in the ordinary case.” *Jones*, 547 US at 230. Moreover, when the government learns that notice sent by mail was unsuccessful, it must take whatever additional steps to notify the property owner are reasonable and practicable under the circumstances. *Id.* at 234. “What steps are reasonable in response to new information depends upon what the new information reveals.” *Id.*

When deciding what process is due under a given set of facts, our Courts generally apply the three-prong balancing test described by the United States Supreme Court in *Mathews v Eldridge*, 424 US 319; 96 S Ct 893; 47 L Ed 2d 18 (1976). See, e.g., *Bonner v City of Brighton*, 495 Mich 209, 235; 848 NW2d 380 (2014).

[I]dentification of the specific dictates of due process generally requires consideration of three distinct factors: First, the private interest that will be affected by the official action; second, the risk of an erroneous deprivation of such interest through the procedures used, and the probable value, if any, of additional or substitute procedural safeguards; and finally, the Government’s interest, including the function involved and the fiscal and administrative burdens that the additional or substitute procedural requirement would entail. [*Mathews*, 424 US at 335.]

Several circumstances in the instant matter are markedly different from those likely found in the average tax foreclosure. First, the subject property is a large parcel of vacant land that is valued, for tax purposes, at well over \$16 million. Thus, Detroit’s proprietary interest is highly significant under the first prong of *Mathews*.

Secondly, the owner of the subject property is the largest city not only in Wayne County but in the state of Michigan. Accordingly, under *Mathews*, there is governmental interest on both sides of this matter, not just in favor of the Treasurer's actions. Moreover, notice by posting was unlikely to notify Detroit, as it might an individual property owner, particularly when the notice was posted on a vacant property in a different municipality. Similarly, the publication of a foreclosure notice in the Detroit Free Press was unlikely to actually notify Detroit of the pending proceedings. Notably, despite the fact that it was published the year *after* the parent parcel was divided into two separate parcels—each with its own tax identification number—the foreclosure notice listed only the parent parcel's tax identification number and a perplexing property address of "00000 Five Mile." Consequently, even if Detroit's employees were aware of the notice, it would not have reasonably drawn their attention to the *subject property*, which had a different tax identification number than that listed in the published foreclosure notice.

Third, as discussed further *infra*, such municipally owned property, while not automatically exempt from *taxation* under the GPTA, is exempt from forfeiture and foreclosure for unpaid taxes. MCL 211.78g(1). As a result, the Treasurer's failure to notify Detroit created a very high risk that the property would be erroneously forfeited, which it later was. Had Detroit been notified of the proceedings, it could have objected to the foreclosure on grounds that the property was not subject to forfeiture, thereby avoiding the erroneous deprivation of the subject property altogether. Likewise, the governmental interests at stake in this case are best served by avoiding such erroneous deprivations of governmental property. Because of the erroneous deprivation, the parties are embroiled in costly, time-consuming litigation, during which the subject property cannot be developed or used for a public purpose by Detroit or Plymouth. All of these undesirable results, and the accompanying expenditure of public resources, could have been avoided if Detroit had been afforded an opportunity to appear and object in the initial foreclosure proceedings.

Ultimately, viewed through the paradigmatic lens of the *Mathews* test, the Treasurer's attempts to notify Detroit of the foreclosure were insufficient to satisfy due process. Despite the relative ease with which it could have provided Detroit with notice of the foreclosure proceedings on Detroit's multi-million dollar property, the Treasurer failed to do so. Instead, it blindly attempted to follow the notice procedures delineated by the GPTA, with which it also failed to comply. As a large, bureaucratic entity, the Treasurer's actions may be understandable and, in many cases, the same actions might have provided the property owner with adequate notice to satisfy due process. But such actions were inadequate to comport with due process under the unique circumstances at bar here.

Next, Plymouth contends that, by promulgating bulletins that list the reasons for which a parcel must be withheld from tax forfeiture under MCL 211.78g(1), the Michigan State Tax Commission (STC) is engaged in quasi-judicial statutory interpretation, further arguing that this Court should correct the STC's erroneous interpretation of the GPTA. We disagree.

The proper interpretation of a statute or administrative rule is a question of law reviewed de novo. *City of Romulus v Mich Dep't of Environmental Quality*, 260 Mich App 54, 64; 678 NW2d 444 (2003). Constitutional questions are also reviewed de novo. *Perfecting Church*, 478 Mich at 6.

“[T]he Michigan Constitution specifically recognizes administrative agencies,” further providing “for judicial review of administrative decisions[.]” *In re Complaint of Rovas*, 482 Mich 90, 99; 754 NW2d 259 (2008). A reviewing court must remain cognizant that administrative agencies engage in several constitutionally distinct functions, each of which is subject to its own standard of review. *Id.* at 108-109.

“Simply put, legislative power is the power to make laws.” *Id.* at 98. “While administrative agencies have what have been described as ‘quasi-legislative’ powers, such as rulemaking authority, these agencies cannot exercise legislative power by creating law or changing the laws enacted by the Legislature.” *Id.* Thus, for an administrative agency to properly exercise rulemaking power, the Legislature must have “properly delegated authority to the agency to promulgate the rule at issue.” *Id.* at 101. The constitutionality of the Legislature’s delegation of rulemaking authority to an administrative agency is a question of law this Court reviews de novo. *Id.* “If the Legislature has properly delegated the rulemaking authority, then the only question . . . is whether the agency has exceeded its authority granted by the statute.” *Id.* (quotation marks and citation omitted).

Administrative agencies also exercise what is sometimes referred to as “quasi-judicial” power to hear and decide certain contested cases, but “such power is limited and is not an exercise of constitutional ‘judicial power.’ ” *Id.* at 98-99. In such instances, an administrative agency may interpret statutory provisions. *Id.* An administrative agency’s statutory interpretation is reviewed under the standard first enunciated in *Boyer-Campbell Co v Fry*, 271 Mich 282; 260 NW 165 (1935):

[T]he construction given to a statute by those charged with the duty of executing it is always entitled to the most respectful consideration and ought not to be overruled without cogent reasons. However, these are not binding on the courts, and [w]hile not controlling, the practical construction given to doubtful or obscure laws in their administration by public officers and departments with a duty to perform under them is taken note of by the courts as an aiding element to be given weight in construing such laws and is sometimes deferred to when not in conflict with the indicated spirit and purpose of the legislature. [*Rovas*, 482 Mich at 101, 108 (second alteration in original), quoting *Boyer-Campbell*, 271 Mich at 296-297 (quotation marks and citations omitted).]

“Respectful consideration” of an agency’s statutory interpretation is not akin to “deference,” at least as that “term is commonly used in appellate decisions” today. *Rovas*, 482 Mich at 108. While an agency’s interpretation can be a helpful aid in construing a statutory provision with a “doubtful or obscure” meaning, our courts are responsible for finally deciding whether an agency’s interpretation is erroneous under traditional rules of statutory construction. *Id.* at 103, 108-109.

The administrative action at issue here is the promulgation of STC Bulletin 10 of 2010, which was the STC bulletin in effect at the time of the foreclosure proceedings on the subject property. In pertinent part, that bulletin states:

The purpose of this Bulletin is to comply with the requirements of MCL 211.78g(1) which indicates in part:

A county treasurer shall withhold a parcel of property from forfeiture for any reason determined by the state tax commission. The procedure for withholding a parcel of property from forfeiture under this subsection shall be determined by the state tax commission.

The State Tax Commission has determined the following are reasons to withhold a property from forfeiture:

* * *

2. *A property owned by the U.S. Government, the State of Michigan, a County, a City, a Village or a Township shall be withheld from forfeiture.*

Plymouth does not argue that MCL 211.78g(1) is an unconstitutional delegation of rulemaking authority or that the STC was acting outside of the authority delegated to it. Hence, Plymouth has abandoned any such arguments, see *In re Mich Consol Gas Co's Compliance*, 294 Mich App 119; 818 NW2d 354 (2011) ("It is not sufficient for a party simply to announce a position or assert an error and then leave it up to the appellate court to discover and rationalize the basis for his claims, or unravel and elaborate for him his arguments, and then search for authority either to sustain or reject his position; failure to brief a question on appeal is tantamount to abandoning it."), and it would be inappropriate for this Court to nevertheless reach the constitutional issue, see *In re MS*, 291 Mich App 439, 442; 805 NW2d 460 (2011) ("[W]e will not address constitutional issues when, as here, we can resolve an appeal on alternative grounds."). Instead, Plymouth contends that the STC's determination that *all* municipally owned property should be exempt from forfeiture under MCL 211.78g(1) is a quasi-judicial determination based on an erroneous interpretation of the GPTA.

Plymouth's argument is unconvincing for three primary reasons. First, it conflates the meaning of "forfeiture" and "foreclosure" as those terms are used in the GPTA. "[F]orfeiture is not the same as foreclosure." *In re Petition of Wayne Co Treasurer for Foreclosure*, 286 Mich App 108, 112 n 2; 777 NW2d 507 (2009). After a property is forfeited to the Treasurer under MCL 211.78g(1), "a subsequent foreclosure judgment is necessary for the [T]reasurer to obtain possession." *Id.*

Secondly, Plymouth confuses exemption from *taxation*, under MCL 211.7m, with exemption from *forfeiture*, under MCL 211.78g(1). The two are not identical. While the former provision provides tax exemption to publicly owned property, so long as it is used for a public purpose, *City of Mt Pleasant v State Tax Comm*, 477 Mich 50, 56; 729 NW2d 833 (2007), the latter provision provides exemption from forfeiture "for any reason determined by the state tax commission," MCL 211.78g(1); *Detroit Bldg Auth v Wayne Co Treasurer*, 480 Mich 897 (2007). Forfeiture under MCL 211.78g(1) is for "unpaid delinquent taxes, interest, penalties, and fees." Thus, for a property to be subject to forfeiture under MCL 211.78g(1), that property must first be subject to taxation, i.e., *not exempt* under MCL 211.7m. Accordingly, while all tax-exempt

properties are necessarily exempt from forfeiture,¹ it does not follow that all properties subject to taxation under the GPTA are necessarily subject to forfeiture under MCL 211.78g(1). On the contrary, the relationship between whether a property is subject to taxation under the GPTA and whether it is subject to forfeiture is merely correlative, not causative. In other words, municipally owned property is exempt under MCL 211.78g(1) because of its municipal ownership, not its tax-exempt status under MCL 211.7m.

Finally, while it assumes that the list of reasons provided in STC Bulletin 10 of 2010 was based on a variety of statutory rationales, Plymouth has cited no evidence in support of that assertion. Indeed, even if Plymouth had done so, it would be improper for this Court to consider such evidence of the agency's intent. "Principles of statutory interpretation apply to the construction of administrative rules." *City of Romulus*, 260 Mich App at 65. Thus, to effectuate the intent of the drafting agency, this Court begins "by reviewing the language of the administrative rule," and, if the rule's "language is unambiguous on its face, the drafter is presumed to have intended the meaning plainly expressed and further judicial interpretation is not permitted." *Id.* "Only where the language under review is ambiguous may a court properly go beyond the words of the statute or administrative rule to ascertain the drafter's intent." *Id.* The plain language of STC Bulletin 10 of 2010 is unambiguous and explicitly provides its supporting rationale: "to comply with the requirements of MCL 211.78g(1)[.]" Consequently, further judicial interpretation is neither necessary nor appropriate.

Finally, Plymouth argues that the trial court erred by holding that all publicly owned property is exempt from forfeiture and foreclosure under the GPTA, regardless of whether such property is used for a public purpose. We disagree.

This Court reviews de novo legal questions, including the proper interpretation of a statute or administrative rule and questions of constitutional interpretation. *Perfecting Church*, 478 Mich at 6; *City of Romulus*, 260 Mich App at 64.

As the trial court recognized, Plymouth's argument is directly contravened by our Supreme Court's recent decisions in *Detroit Bldg Auth*, 480 Mich at 897, and *In re Wayne Co Treasurer*, 480 Mich 981 (2007) (*Watson II*), mod on reconsideration 480 Mich 1139 (2008). Although both were decided by published orders, not opinions, those orders are nevertheless "binding precedent" because each "constitutes a final disposition of an application [for leave to appeal] and contains a concise statement of the applicable facts and reasons for the decision." See *DeFrain v State Farm Mut Auto Ins Co*, 491 Mich 359, 369; 817 NW2d 504 (2012). In *Detroit Bldg Auth*, 480 Mich at 897, our Supreme Court cited MCL 211.78g(1) in support of its holding that "[t]he foreclosure sale of publicly owned property is prohibited," which is a holding that Court later reiterated—almost verbatim—in *Watson II*.

Since this Court is bound to follow established precedent, we decline Plymouth's invitation to announce a different construction of MCL 211.78g(1). Read in concert with MCL

¹ Except properties that accrue unpaid taxes, interest, penalties, and fees *before* gaining tax-exempt status.

211.78g(1) and STC Bulletin 10 of 2010, our Supreme Court's decisions in *Detroit Bldg Auth* and *Watson II* unambiguously support the proposition that *all* publicly owned property, including the municipally owned property at issue in this case, is exempt from forfeiture and subsequent foreclosure under the GPTA, regardless of whether such publicly owned property is exempt from taxation under the GPTA.

Affirmed.

/s/ Michael J. Talbot
/s/ Mark J. Cavanagh
/s/ Kirsten Frank Kelly